Case Law Updates 2008-2009

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Michigan Supreme Court Decisions

- In re Ayden Rood, Supreme Court No. 136849 (entered on April 2, 2009)
- Facts: After the child's removal from BM, DHS made very limited efforts to contact BF. BF made initial effort to contact. Attended court hearings when given proper notice. Didn't want custody of the child if BM was going to get him. Adequately caring for another child at home.
- DHS' efforts consisted one phone call (to an outdated number), didn't call the number given by the father at a court hearing, no contact through mail. Months between efforts. Court sent notice to the wrong addresses.
- 14 months between contacts. During that time father didn't visit the child or provide financial support (no order). Rights subsequently terminated based on lack of involvement, criminal convictions, failure to pay child support.

Rood

- Issue before the Court: Does the failure to make reasonable efforts and the failure to give BF adequate notice about the proceeding warrant the reversal of the TPR decision?
- Supreme Court: Yes
- “Fundamental liberty interest of natural parents . . . does not evaporate simply because they have not been model parents.”
- “When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”

Rood

- DHS failed to make reasonable efforts to reunify family.
  - Must notify all parents of court hearings
  - ISP must involve both parents
  - Child placed in most family-like setting; obligation to identify and consult with relatives

"The state's failures of notice directly affected respondent's substantial rights because his lack of participation in the earlier proceedings and service plans prevented the court from meaningfully considering whether respondent could become capable of caring for his child within a reasonable time."

Rood

- BF's culpability did not excuse or mitigate the state's failure to comply with its statutory duties.
- Bottom line: take reasonable efforts seriously, include BOTH parents in the development of service plans, adequately assess BOTH parents for reunification, and make sure parents get proper notice for every hearing. Don't wait for TPR to search for the other parent.

In re Hudson-Morgan, Supreme Court No. 137362 (entered on April 8, 2009)

- Facts: Petition filed regarding three children, Children remain in home with BM and BF after filing of petition. Concerns include conditions of the home, drug use, mental health issues, financial issues. No attorney appointed for BM and BF at the preliminary hearing. BM and BF enter into a plea for jurisdiction at preliminary without attorney. Not advised that plea can be used against them in TPR case.
- Children subsequently removed. BF drops out of the picture. BM participates in the service plan: therapy, drug treatment, obtains employment, visits children regularly.

Hudson Morgan

- Facts continued: Oldest child bounces around to 4 foster homes; youngest two children physically disciplined in foster home causing them to move to another home.
- DHS files TPR petition. Children do not want parental rights terminated. Oldest child is 16 at the time of TPR hearing. DHS concerned that BM doesn't have adequate housing; consistent employment, continued drug use, ongoing relationship with BF, mental health issues, special needs of children.
- Counsel appointed for BM two weeks before hearing. Trial court terminates BM's rights.

Hudson Morgan-Court of Appeals Decision

- COA reverses TPR decision.
- "Obvious dearth of evidence supporting any of the statutory grounds invoked by the circuit court."
- Questions before the Michigan Supreme Court.
  - Was there sufficient evidence to terminate parental rights?
  - Did the trial court commit procedural errors that warrant reversal?

Hudson-Morgan: Supreme Court Decision

- Supreme Court affirms the judgment of the Court of Appeals.
- Trial court committed clear error in finding that evidence existed to terminate parental rights.
- Trial court committed plain error in failing to adequately advise the respondent of the right to counsel, in failing to timely appoint counsel and in failing to advise her that her plea could be used against her in a subsequent TPR case.

Cases Pending Before The Michigan Supreme Court

- In re McBride, Ct of Apps Decision No. 282062 (entered on July 15, 2008)

- In re Jaden Lee, Ct of Apps Decision No. 283038 (entered on October 16, 2008)

In re McBride

- Facts: Children removed from BM and placed in non-relative foster care. BF incarcerated until 2015. BF's sister requests placement and is summarily denied.
- No efforts are made to arrange for BF to appear in case via telephone as required by MCR 2.004 for the first 13 months of the case until the TPR hearing.
- At TPR hearing, BF appears via telephone, requests counsel, trial court denies the request.
- Rights subsequently terminated.

McBride

- Issues before the Court: 1) Did the trial court error in denying counsel to BF? 2) Can the complete denial of counsel be deemed a harmless error? 3) If so, can the trial court's failure to consider paternal relatives for placement preclude a finding that the error was harmless?
- COA: Trial court erred in depriving BF of a lawyer but the error was harmless. Strong dissent from Judge Gleicher.
- Remains pending

In re Jaden Lee

- Facts: BM (former foster child) was a member of a Native American tribe. Had four children. Rights to three of them had been terminated. In those cases, services were provided to BM. Last service provided in 2005.
- Jaden removed in 2001 due to neglect; child protective case closed in 2002 when placed with PGM under a limited guardianship. BM obtained custody of Jayden, he re-entered foster care and ultimately his father was given full-custody in 2004; BM had visitation rights.

In re Jaden Lee

- BF gets arrested in 2007, DHS files petition, court obtains jurisdiction over Jayden through BF and the DHS immediately moves for TPR based on prior terminations w/o offering services to mother.
- Jayden was having unsupervised weekend visits with his mother for four years prior to the time of the petition's filing, enjoyed visits and wanted a relationship with his mother. Trial court terminated parental rights.

Lee-Court of Appeals' Decision

- Affirmed trial court's decision to terminate parental rights.
- Formal and informal services provided prior to the current proceedings may meet the active efforts requirement. Endorses futility exception.
- Evidence existed beyond a reasonable doubt that continued custody of the child with BM was likely to result in serious emotional or physical damage to the child. Applies anticipatory neglect argument.

Lee-Dissent

- Strong Dissent
- Active efforts requirement cannot be met by services provided three years ago. Federal law trumps.
- To meet beyond a reasonable doubt standard, need contemporaneous evidence of parental unfitness. Can't presume solely based on past conduct. Cites Stanley v. Illinois

Lee-Supreme Court

- Addressing two questions
  - Does the active efforts requirement mandate recent efforts to reunify or rehabilitate that particular family?
  - Does the beyond a reasonable doubt standard require contemporaneous evidence of unfitness?

  Oral argument held on March 4, 2009.

  Issues similar to those in In re Roe, No. 283642 (entered on September 25, 2008).

Published Court of Appeals' Decisions
In re SLH, No. 276631 (entered on January 24, 2008)

Facts: Clinton County DHS submitted a petition alleging that BF sexually abused one of the kids. Mom woke up in the middle of the night and found dad having sex with the child. BF admitted to BM that he had been having sex with the child. Included other allegations of sexual abuse. Petition did not include a request to remove the children or the BF from the home nor a request to terminate the parental rights of BF.

10/25/06: Prelim. Mother and BF waived reading. Attorney appointed to represent BF, court noted that there had been no request for termination, and prelim was adjourned until 10/30/06. BF waived probable cause determination. Petition was authorized. Pretrial scheduled.

Pretrial- trial court took plea for jurisdiction from BM. BM pled that BF sexually abused the children. BF objected claiming that b/c there were no allegations against her, she couldn't enter plea. Court accepted her plea. Didn't recite any rights set forth in MCR 3.971(B). Set matter for dispositional hearing and indicated that at that hearing, it would consider, request to terminate parental rights of BF. No petition to terminate was filed. Rather than issue an order of adjudication after the hearing, court entered an order after preliminary Hearing.

Dispo: court considered question of termination. BM testified. Court found basis for terminating rights of BF to all three children. Only stated findings as to one child.

In re SLH, No. 276631 (entered on January 24, 2008)

- COA reverses
- BM not a respondent. Petition made no allegations that the mother had committed an act or omission that would bring the children within the jurisdiction of the court pursuant to MCL 712A.2(b). Trial court uses a failure to protect theory but nothing in petition to support this theory, evidence actually showed that she protected children by immediately removing respondent from the home and not letting the children having further contact with him.
- Since no trial was held, respondent entered no plea and the mother's purported plea was invalid, court never obtained jurisdiction of the children. As a result, order of disposition and order terminating parental rights were invalid. MCR 3.977(E) provides that you need jurisdiction before you get termination. Additionally, no request for termination was ever made.

In re Keast, No. 279820 (entered on February 5, 2008)

- Facts: Parental rights terminated. Children committed to MCI. Competing sets of potential adoptive parents: foster parents v. maternal grandparents. Children previously resided with maternal grandparents but had been removed b/c of drug use, unauthorized visits with BM, among other issues. FCRB affirmed removal. MCI granted consent to foster parent. Grandparents file Section 45 motion and trial court determines that withholding consent to maternal grandparents was arbitrary and capricious b/c MCI didn't fully consider all the evidence. Grants grandparents' adoption petition.

In re Keast, No. 279820 (entered on February 5, 2008)

- COA: Trial court erred in overruling MCI's determination.
- "It cannot be said that a decision is arbitrary and capricious if there exists a good reason for it."
- MCI superintendant's decision was overwhelmingly supported by the documentation provided to him as well as by his independent investigation.

In re LE, No. 276924 (entered on February 12, 2008).

Facts: Father admitted he had a substance abuse problem, used drugs since he was 13 years old, drank daily, used cocaine 2 or 3 times a month since he was 18 or 20, had convictions, received a gunshot wound to the stomach, not a boy scout.

BF didn't show up at preliminary hearing. Attended pretrial hearing indicating that he wished to become legal father. BM confirmed that he was biological father. Court told him to perfect paternity within 14 days. Didn't order paternity test since all parties including the BM agreed he was the bio-dad and affidavit of parentage sufficed.

BF went AWOL from March 2005 to August 2006 (17 months). During that time, he was in jail, in a substance abuse treatment program,. Shows up at a court hearing in August 2006, BM signs affidavit of parentage. Immediately, agency moves to terminate his rights. BF loses.

In re LE, No. 276924 (entered on February 12, 2008)

Two main arguments on appeal

1) DHS failed to comply with its statutory duties to assist father and provide him with services once he perfected paternity.

   Ct of Appeals: Nothing in statute requires DHS to make reasonable efforts to provide services to putative fathers.

   Not entitled to services after he perfected paternity. At any hearing during the 17 months in which the father was AWOL, court could have determined that BF waived all rights to further notice. Court didn't have to allow BF a chance to perfect paternity. No provision in the law for agency to begin to provide him with services 17 months after he was instructed to perfect paternity, when he finally chose to participate in these proceedings. Services don't need to be provided when reunification is not intended. 712A.18f(1)(b).

In re LE, No. 276924 (entered on February 12, 2008)

2) Court erred in considering his failings as a parent before he began the child's legal father. At that point, he didn't owe a legal duty to the child

Ct. of Appeals: Father's conduct before perfecting paternity can provide a basis for termination. Even though no legal duty, had a moral duty to do so and should have offered support or at least a plan to care for the child. Should have more promptly taken stops to formally acknowledge paternity, and we hold that his failure to do so may be used against him. Analogizes to other parts of the statute: grounds involving siblings, prior termination, anticipatory neglect.

In re B and J, No. 279461 (entered on May 13, 2008)

- Facts: Court assumed jurisdiction over four children. Parents of the children were all undocumented. Three of the children were US citizens. DHS failed to provide services to the family and instead reported the parents to ICE. Parents deported. Children remained in foster care.
- Trial court found that behavior was "morally repugnant" and that parents had fully and actively participated in the proceedings.
- TPR petition filed. Court found that grounds under MCL 712A.19b(3)(a)(ii) or MCL 712A.19b(3)(j) had not been established but grounds under MCL 712A.19b(3)(g) had.

In re B and J, No. 279461 (entered on May 13, 2008)

- COA reverses decision.
- The State cannot create the conditions that will strip an individual of an interest protected under the due process clause.
- “When the state deliberately takes action with the purpose of virtually assuring the creation of a ground for termination of parental rights, and then proceeds to seek termination on that very ground, the state violates the due process rights of the parent.
- COA orders that the children and parents be reunited in Guatemala.

In re Utrera, No. 280531 (entered on September 23, 2008)

- Facts: BM filed petition in probate court requesting limiting guardian to be appointed b/c she lacked housing. Child lived with guardian for five years. BM didn't comply with placement plan. GAL filed petition for jurisdiction and requested termination at initial disposition. Several adjournments occurred. Trial court eventually assumed jurisdiction and terminated parental rights pursuant to MCL 712A.19b(3)(d) and (j).

In re Utrera, No. 280531 (entered on September 23, 2008)

- On appeal, BM argued that trial court erred by failing to conduct adjudication in a timely manner as set forth in MCR 3.972(A).
- COA holds that trial court erred but the error didn't affect the outcome and thus reversal is not warranted.
- BM also argues that hearsay was improperly admitted. Hearsay not admissible when termination is sought at the initial disposition.
- COA agrees but finds that error was harmless.

In re Jenks, No. 284387 (entered on November 20, 2008)

- Facts: BF pled guilty to sexually abusing his stepdaughter. Rights were subsequently terminated to his own children based on the conviction.
- COA: Can terminate pursuant to MCL 712A.19b(3)(b)(i) and MCL 712A.19b(3)(k)Iii) even when the parent (abuser) was not the parent of the child who was sexually abused.

In re Greene, No. 286252 (entered on March 24, 2009)

- Facts: BM requested additional services under the Americans with Disabilities Act (ADA). ADA requires DHS to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefit of public programs and services.
- BM suffered from low cognitive functioning and mental health concerns. Falls within the definition of a disability pursuant to the ADA.
- Trial court never determined whether BM had a "disability" and whether she was entitled to special accommodations under the ADA. Just offered her the ordinary range of services.
- COA reverses TPR and requires trial court to make required inquires.

Where to go to get updates

- Can sign up to receive opinions at the Court of Appeals' website:
  - http://coa.courts.mi.gov/